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No. 96

In the Supreme Court of the United States

OCTOBER TERM, 1996

MARION S. BARRY, JR., *et al.*,
Petitioners,

v.

LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

I. Whether a federal court must have a federal basis for reforming local government institutions and whether any such judicial reform must be tailored to remedying only violations of federal rights.

II. When a federal court has refused to find federal liability, can that court, in purporting to reform local government institutions under local law, properly refuse to measure the scope of the remedy against local law on the ground that the local government had agreed to such relief if, and to the extent that, it was found liable under federal law.

PARTIES

This action was certified as a class action in the United States District Court for the District of Columbia. The lead plaintiff in that court, who is the lead respondent in this Court, is LaShawn A., by her next friend, Evelyn Moore. The petitioners in this Court are: Marion S. Barry, Jr., Mayor of the District of Columbia; and several subordinate District officials, Wayne Casey and Annie Goodson. Petitioners appear in this Court in their official capacities as sucessors in interest to the original defendants, all of whom were sued in their official capacities: Marion S. Barry, Jr., Peter Parham, Barbara Burke Tatum, Jean R. Hunter, and Evelyn Andrews.

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MARION S. BARRY, JR., *et al.*,
Petitioners,

v.

LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Marion S. Barry, Jr., Mayor of the District of Columbia, and several subordinate officials of the District of Columbia, petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The October 30, 1996, judgment of the United States Court of Appeals for the District of Columbia Circuit (App. 1a-2a) is not reported. The decisions of the United States District Court for the District of Columbia dated November 12, 1993; December 13, 1993; and January 27, 1994; are not reported. App. 101a, 103a & 104a.

The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). Following its decision, petitioners filed a timely petition for rehearing and a suggestion for rehearing *in banc*. The petition and suggestion were denied on December 13, 1996. App. 188a & 189a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 84 Stat. 473, codified in part in D.C. Code § 11-101 *et seq.* and § 11-1101 (1989 repl.); the Prevention of Child Abuse and Neglect Act of 1977, D.C. Law 2-22 (1977), D.C. Code §§ 2-1351 to -1357, §§ 6-2101 to -2107, §§ 6-2121 to -2127, & §§ 16-2351 to -2365 (1988 & 1989 repl.); and the Youth Residential Facilities Licensure Act of 1986, D.C. Law 6-139 (1986), D.C. Code §§ 3-801 to -808 (1988 repl.).

Relevant provisions of these statutes are reproduced in a statutory appendix.

STATEMENT OF THE CASE

I. INTRODUCTION.

The protection and care of abused and neglected children have long been the special responsibilities of local government. To safeguard the interests of these children and of their parents, the states and the District of Columbia have enacted comprehensive legislation concerning child abuse and neglect, foster care, termination of parental rights, adoption, and related matters. These jurisdictions also have established specialized family courts to administer these laws.

This action was brought to have the federal judiciary reform the District of Columbia's child-welfare system. Its

stated principal aims were: (1) to secure services for families that would prevent the removal of abused and neglected children from home or that would permit them to return home and (2) if a return home were not possible, to terminate parental rights quickly to increase the possibility of adoption.

The United States District Court for the District of Columbia, the Honorable Thomas F. Hogan, ruled that the District's child-neglect and foster-care system violated numerous rights guaranteed by federal legislation and the Constitution. Based on these rulings, the parties negotiated, and he approved, a far-reaching, *but conditional*, remedial decree restructuring the system. In the decree, the District reserved the right to challenge his liability rulings and any remedy arising from those rulings.

On appeal, the United States Court of Appeals for the District of Columbia Circuit refused to decide whether federal law could support the decree. Instead, the court *sua sponte* held that Judge Hogan could and should reform the District's child-welfare system based solely on local law, *if possible*. The court did so even though it acknowledged that Judge Hogan had declined to exercise pendent jurisdiction and did not find that he had abused his discretion in refusing to decide local-law claims.

On remand, Judge Hogan re-entered the sweeping remedial decree. The District again appealed. A divided panel ruled that the first panel had seriously erred in not determining whether the decree could be supported by federal law and it remanded the case for that purpose. Plaintiffs successfully sought rehearing *in banc*. The full court ruled that the law-of-the-case and law-of-the-circuit doctrines barred reconsideration of the decision of the first panel and it remitted the case back to the second. The second panel then

affirmed. It concluded that, to the extent the sweeping remedial decree exceeds local law, the decree exceeds federal law as well, and that the District's conditional agreement to the decree, based on a federal premise to be tested on appeal, could be extended to a decree without a federal premise. There was no need therefore for the court to determine whether the decree was supported by local law.

The decision of the D.C. Circuit contravenes fundamental principles of federalism and comity. The court erred in holding that a federal court may, without any federal basis whatsoever, reform the District's child-neglect and foster-care system. The District's compliance with its own laws governing the protection of abused and neglected children is properly left to local government institutions, including its specialized family court.

The D.C. Circuit also erred in upholding the decree without measuring its scope against local law. The District's consent to the decree was expressly conditioned on affirmance of Judge Hogan's sweeping federal liability findings. A federal court acts improperly when it upholds an institutional reform decree which it recognizes is not supported by agreement (because the condition of the agreement was not satisfied) or by law (because it exceeds both federal and local law).

II. Procedural History.

A. United States District Court.

This case was brought as a class action on behalf of two groups of children: (1) children about whom reports of neglect or abuse have been made and (2) abused or neglected children who enter the District's foster-care system. The

complaint alleged federal statutory and constitutional claims and pendent District-law claims. The District unsuccessfully moved to dismiss the complaint on several grounds, including abstention and failure to state a claim.

Following a bench trial, Judge Hogan ruled, on April 18, 1991, that the District's child-neglect and foster-care system violated rights guaranteed by two federal statutes, the Adoption Assistance and Child Welfare Act of 1980[1/] and the Child Abuse Prevention and Treatment Act,[2/] and that these rights are enforceable pursuant to 42 U.S.C. § 1983. In addition, he ruled that the system violated the substantive and procedural components of the Due Process Clause of the Fifth Amendment. The procedural due process ruling was based on the theory that two District statutes and an internal operating manual developed by its child-welfare agency, the Department of Human Services ("DHS") create liberty interests within the meaning of the Due Process Clause. App. 3a-82a.[3/]

1. Findings of Fact. Judge Hogan found that the District violated the federal statutory rights of children who are reported to be abused or neglected but who are not in the District's foster-care system. First, DHS failed to initiate prompt investigations of reports of neglect. App. 21a-24a.

[1/]94 Stat. 500, codified in Title IV-B of the Social Security Act, 42 U.S.C. §§ 620-627, and in Title IV-E, §§ 670-679.

[2/]88 Stat. 4 (1974), 42 U.S.C. §§ 5101-5106, as added 102 Stat. 110 (1988), and renumbered 103 Stat. 764 (1989), 42 U.S.C. § 5106a.

[3/]The two local statutes were the Prevention of Child Abuse and Neglect Act of 1977), D.C. Law 2-22 (1977), D.C. Code §§ 2-1351 to -1357, §§ 6-2101 to -2107, §§ 6-2121 to -2127, & §§ 16-2351 to -2365 (1988 & 1989 repl.); and the Youth Residential Facilities Licensure Act of 1986, D.C. Law 6-139 (1986), D.C. Code §§ 3-801 to -808 (1988 repl.).

Second, DHS failed to provide services "to enable children to remain with their families or reunite with them if temporary placement is required" in violation of the "reasonable efforts" plan requirement of the federal Adoption Assistance Act, 42 U.S.C. § 671(15). App. 25a. In addition, as a predicate for his constitutional rulings, Judge Hogan ruled that this conduct violated District law. App. 21a-25a.

Judge Hogan also found that the District violated the federal statutory rights of children in foster care. For example, DHS permitted children voluntarily committed to its custody by their parent(s) to remain in that status for too long. App. 26a. In addition, children were not placed in the "least restrictive" placement. App. 27a.

Finally, and again as a predicate for his constitutional rulings, Judge Hogan found that DHS was violating local law and agency policy by failing to "'prepare a permanent plan'" for the placement of children who cannot be returned home within a reasonable time. App. 34a. DHS was not expeditiously seeking to terminate parental rights or referring children who had been freed for adoption to its Adoption and Placement Resources Branch. App. 35a.

2. Legal Rulings. Judge Hogan based liability solely on violations of federal rights. He ruled that 42 U.S.C. § 1983 is available to enforce both the federal Adoption Assistance Act and the Abuse Prevention Act. App. 61a-64a. In so ruling, he rejected the District's argument that "the federal statutes relied upon by plaintiffs merely establish state grant programs and do not create actionable rights . . .." App. 62a.

Despite his federal statutory rulings, Judge Hogan found it necessary to determine whether the District's actions violated the Constitution. A constitutional ruling was neces-

sary, he explained, because, if the District decided to forego federal funding, "the Court would have *no basis* for enforcing any injunction it might order." App. 66a (emphasis added).

On the constitutional issues, Judge Hogan ruled that "plaintiffs have a liberty interest in safe conditions" arising from the substantive component of the Due Process Clause (App. 70a) and more specifically, "a right to reasonably safe placements in which they will not be harmed." App. 71a. "This right," moreover, "extends to safety from psychological and emotional harm." App. 71a. He also ruled that plaintiffs have a liberty interest in services: "To the extent that certain services, such as appropriate placements and case planning, are essential to preventing harm to the children in the District's custody, . . . the children have a constitutional liberty interest in those services." App. 72a.

In addition, Judge Hogan ruled that the District's own statutes and DHS's internal operating manual create constitutionally protected interests because they provide specific standards for safeguarding children who are reported to be neglected or abused or who are in the District's foster-care system. App. 72a-74a.

Finally, Judge Hogan ruled that the District had violated plaintiffs' liberty interests in freedom from harm: "The facts . . . establish beyond any doubt that defendants have failed to protect these plaintiffs from harm -- whether physical, psychological, or emotional -- by failing to place plaintiffs appropriately, failing to prepare case plans, failing to monitor placements, and failing to ensure permanent homes, among other things." App. 78a.

The parties then negotiated an 84-page remedial decree ("Final Order") conforming to the court's sweeping federal

liability rulings. This detailed decree regulated every aspect of the District's child-neglect and foster-care system (*e.g.*, protective services, services to families, placement of children, planning, adoption, caseloads, staffing, worker qualifications, training, resource development, contract review, information systems, financial development).[4/] In this decree, the District expressly reserved the right to appeal the court's federal liability rulings and the parties agreed that the decree would be "null and void" to the extent that these rulings did not withstand appellate review. See App. 201a. Judge Hogan approved the Final Order on August 27, 1991. App. 83a.

B. The Court of Appeals -- *LaShawn I.*

A panel of the D.C. Circuit affirmed the judgment. First, it ruled that *Younger* abstention,[5/] as expanded in *Moore v. Sims*, 442 U.S. 415 (1979), did not require Judge Hogan to abstain from deciding the constitutional claims of children who are parties to local family-court neglect and adoption proceedings. App. 87a-92a.

Nevertheless, the panel refused to decide the merits of what it regarded as "the complex constitutional and federal statutory issues in this case," including the District's argument that this Court's intervening decision in *Suter v. Artist M.*, 503 U.S. 347 (1992), required reversal of the ruling that the federal statutes relied on by plaintiffs were privately enforceable. App. 92a. It was unnecessary to reach these issues because, according to the panel, "[t]he District of Columbia's statutes and regulations provide a scheme for the protection

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[4/] Twelve copies of this decree have been lodged with the Clerk's Office of this Court. See also App. 190a-201a.

[5/] *Younger v. Harris*, 401 U.S. 37 (1971).

and care of foster children, and children reported to be abused or neglected, that is equally as comprehensive as that provided by the federal statutes and is appropriately before us under our pendent jurisdiction." App. 92a. The panel exercised pendent jurisdiction *sua sponte* and without finding that Judge Hogan had abused his discretion in declining to do so. Citing *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), the panel announced, without any analysis, that "[o]ur authority to decide the case entirely on pendent state grounds is incontrovertible." App. 96a. Thus, although unwilling to resolve the District's *Suter* challenge to Judge Hogan's federal statutory rulings, the panel seized the opportunity to rule -- erroneously -- that the District's child-neglect and foster-care laws are enforceable in private actions. App. 93a-96a.

Insofar as the remedial decree is concerned, the panel ordered Judge Hogan to re-enter it based on local-law, "if possible." App. 97a. The panel did so without considering that it had been negotiated on the basis of sweeping federal liability rulings -- rulings the panel had declined to affirm -- and without ruling on the legal significance of the District's reservation-of-rights clause. The panel did caution that the decree could not be re-entered to the extent that Judge Hogan found, on remand, that the decree did not have either a local-law basis or, after *Suter*, a federal statutory basis. App. 96a-97a. The panel did not authorize Judge Hogan to revisit his constitutional rulings.[6/]

[6/]The panel's implicit ruling that plaintiffs' constitutional claims were insubstantial is sound. *See, e.g., DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989). Despite the flaws in the District's child-welfare system set forth in Judge Hogan's opinion, that opinion does not set forth findings of fact or evidence that approximate the allegations that have persuaded other federal courts to find a potential due process violation. *See, e.g., Yvonne L. ex rel. Lewis v. New Mexico Dep't*

(continued...)

The District unsuccessfully sought rehearing. Two judges (Buckley & Williams, JJ.) would have granted the suggestion for rehearing *en banc* to certify to the District of Columbia Court of Appeals whether District "law provides a private right of action . . .." App. 100a. This Court then declined review. *Kelly v. LaShawn A.*, 510 U.S. 1044 (1994).

C. THE REMAND.

On remand, Judge Hogan rejected the District's argument that the reservation-of-rights clause in the remedial decree required dissolution of the decree because its federal premise had, in effect, been vacated on appeal. App. 101a-102a. In his view, his opinion had been "affirmed." App. 101a. In addition, despite the D.C. Circuit's directive that he measure the decree against local law, he ruled that "*the Court deems it a necessary and appropriate use of its equitable authority to order a remedy which exceeds the specific mandates of local law.*" App. 104a (emphasis added). He thus re-entered the decree, deleting citations to federal law.[7]

The District again appealed.

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[6](...continued)
of Human Services, 959 F.2d 883, 893 (10th Cir. 1992) (foster-care child who was allegedly raped in foster-care facility has constitutional cause of action if she can establish that officials placed her in facility either knowing or suspecting that it was dangerous); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990) (Posner, J.) (placement of child with foster parent known to be, or suspected of being, a child abuser violates due process, but seemingly mindless shuttle of child from one foster home to another does not).

[7]Twelve copies of the revised decree have been lodged with the Clerk's Office of this Court. Excerpts are set forth in App. 190a-201a.

D. THE COURT OF APPEALS -- *LASHAWN II*.

1. The Panel Decision of October 31, 1995.

A divided panel reversed. In a thoughtful decision, the panel majority (Williams & Henderson, JJ.) ruled that a federal court does not have "jurisdiction to enforce a wide-ranging institutional reform order against the government of the District of Columbia based entirely on District of Columbia law." App. 108a. It took "seriously" this Court's statement that "'the issue whether pendent jurisdiction has properly been assumed . . . remains open throughout the litigation.'" App. 130a, quoting *United Mine Workers of America v. Gibbs*, *supra*, 383 U.S. at 727. This Court's decision in *Suter v. Artist M.*, *supra*, had "flatly remove[d] some of the supports of pendent jurisdiction, and, at a minimum enfeeble[d] most of the others . . .." App. 130a.

The panel majority remanded for reconsideration of the existence of any federal statutory claim and the District's reservation-of-rights clause. It ruled that "since the provisions of the consent decree were negotiated as responses to specific findings of violations, the parties clearly anticipated that any undermining of those findings would require that the District be freed of the affected provisions." App. 125a.

2. The *In Banc* Decision of July 9, 1996.

Plaintiffs successfully sought rehearing *in banc*. The full court ruled that the *LaShawn II* panel had violated the law-of-the-case and law-of-the-circuit doctrines. App. 156a-170a. It returned the case to the panel for further consideration.

Judge Silberman concurred. App. 171a-172a. He did not think it was "clear error for the original panel to have pretermitted the federal statutory and constitutional questions . . .." App. 171a. Nevertheless, the decision to exercise pendent jurisdiction was "dubious" because the court traditionally has treated the District like a state. App. 171a. Under *Gibbs* and *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), the *LaShawn I* panel should have decided "the federal questions first so that if they were decided against the plaintiffs, the case should be dismissed." App. 171a. Judge Silberman concluded: "If home rule is to be abolished . . ., it should be done by Congress, not incrementally by federal judges." App. 172a.

Judges Williams and Henderson, reiterating the *LaShawn II* majority opinion, dissented. App. 173a-187a.

3. The Panel Decision of October 30, 1996.

The *LaShawn II* panel, in its second decision, disposed of the District's appeal in an unpublished order. First, it acknowledged that the District's consent to the remedial decree was "to be sure . . . conditioned on affirmance of the district court judgment on federal grounds." App. 2a. But that express condition was now irrelevant because the decree "does not extend beyond District law more than it extends beyond federal law." App. 2a. In other words, because the District had agreed to a remedial decree based on what it considered to be false federal premises to be challenged on appeal, including a ruling that local law and DHS's internal operating manual created constitutional liberty interests, the

District could be judicially bound to the decree based on false local-law premises.[8/]

III. DISTRICT LAW GOVERNING ABUSED OR NEGLECTED CHILDREN, FOSTER CARE, TERMINATION OF PARENTAL RIGHTS, AND ADOPTION.

The District of Columbia, like each of the states, has a comprehensive statutory framework governing the identification and protection of abused or neglected children, foster-care arrangements for such children, termination of parental rights, and adoption. Like each of the states, it also has a specialized family-court system for administering these laws. The District's system became a purely local system in 1970 when Congress enacted the District of Columbia Court Reform and Criminal Procedure Act of 1970.[9/] In the Court Reform Act, Congress created an independent local court system for the District and conferred on the Family Division of the District of Columbia Superior Court "exclusive jurisdiction" of neglect and adoption proceedings. See D.C. Code § 11-1101(9) & (13) (1989 repl.).

The District's Abuse and Neglect Act provides that its Department of Human Services ("DHS") shall investigate within 24 hours reports of neglected children and that the Metropolitan Police Department shall "immediately" investi-

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[8/]Thus, although Judge Hogan had invoked what he believed to be his "equitable authority" in re-entering the decree, the *LaShawn II* panel, in its second decision, wrote that it "infer[red] that the district court reasoned that the substitution of District law alone as the basis of the decree, in place of reliance on federal plus District law, did not materially undermine the District's consent." App. 2a.

[9/]Pub. L. 91-358, 84 Stat. 473, now codified in part in D.C. Code § 11-101 *et seq.* and § 11-1101 *et seq.* (1989 repl.).

gate reports of abused children. D.C. Code §§ 6-2102(b) & 6-2103(c). In these investigations, a preliminary determination is made whether a child should be removed from his home or whether the child "can be protected by the provision of services or resources." D.C. Code § 6-2105(a) & (b).

D.C. Code § 16-2301 *et seq.*, governs judicial protection of children believed to be abused or neglected. The Family Division oversees every important decision concerning such children -- *e.g.*, whether, in fact, they have been abused or neglected and, if so, how they should be cared for. D.C. Code §§ 16-2312, 16-2313, 16-2317, 16-2320, 16-2322, 16-2323. It conducts evidentiary hearings on each of these matters after notice to all interested parties. D.C. Code §§ 16-2312, 16-2317, 16-2320. In these proceedings, a child is entitled to counsel, who is compensated by the District, as are his parent(s), if they cannot afford counsel. *Id.* The decisions issued by the Family Division are required to be "in the best interest of the child . . .." D.C. Code § 16-2320(a).

The Family Division periodically reviews dispositional orders. D.C. Code § 16-2323(a). At these hearings, it considers the extent to which a parent(s) has visited his or her child; whether and when a child may be returned home; and whether DHS intends to seek termination of parental rights and, if not, why not. D.C. Code § 16-2323(b).

District law also governs termination of parental rights and adoption, D.C. Code §§ 16-2351 to -2365. These provisions are intended to "encourage stability in the lives" of children by terminating the rights of parents who are no longer capable of caring for them, "ensure that the constitutional rights of all parties are recognized and enforced," and "increase opportunities for the prompt adoptive placement of children for whom parental rights have been terminated."

D.C. Code § 16-2351(a)(1), (2) & (3). To accomplish these goals, parties to a proceeding to terminate parental rights must include the child, his parent(s), and the agency having custody of the child. D.C. Code § 16-2356. In addition, in the case of a child who has been adjudicated abused or neglected and committed to the District's custody for more than 18 months and for whom no hearing on a motion to terminate parental rights has been held within the preceding 12 months, the law provides that the Family Division shall hold a review hearing to determine why a motion to terminate the parent-child relationship has not been filed; such hearings are thereafter held annually if necessary. D.C. Code § 16-2355(a) & (b).

If parental rights are terminated, the District assumes legal custody of the child and attempts to place the child permanently. D.C. Code § 16-2360. If an adoptive placement is not made within six months, the Family Division monitors the District's efforts and has the power to order such a placement. D.C. Code § 16-2360(b).

REASONS FOR GRANTING THE WRIT

This case concerns fundamental questions of federalism and comity that are of great importance to local governments and to the people they represent and serve. The D.C. Circuit has held that a federal court has the power to reform local government institutions without a federal basis and that the scope of its power need not be measured against *any* law.

Furthermore, the D.C. Circuit has issued this ruling in an area of central importance to local governments. It has ruled that a federal court has the "incontrovertible" power to reform local child-welfare agencies based solely on its interpretation of local law. The D.C. Circuit so ruled even though many of the claims here constitute the very *raison d'etre* of

family-law courts -- whether children have been abused or neglected; whether they should be removed from their homes, and, if so, where they should be placed in foster care; whether the rights of their parents should be terminated; and adoption.

The D.C. Circuit's pendent-jurisdiction decision disregards the principles of federalism and comity underlying this Court's jurisprudence and is at odds with the decisions of other Circuits. In addition, its decision to uphold the remedial decree without measuring the scope of the decree against the violation of *any* law, federal or local, is also fundamentally flawed. These decisions conflict with the principles set forth in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984); *Lewis v. Casey*, 116 S. Ct. 2174 (1996); and other decisions of this Court. Under this Court's decisions, federal courts should not entertain pendent claims against local governments in institutional reform litigation. In addition, this Court has ruled that federal courts have an obligation to ensure that institutional reform decrees are tailored to violations of law and that they do not usurp the legitimate functions of the political branches.

The D.C. Circuit, however, has ruled that massive relief can be ordered against the District, without a federal basis and with only a theoretical local-law basis, and that it may do so in family-law matters that have been entrusted by Congress to the District's legislative, executive, and judicial branches. The D.C. Circuit issued this ruling, moreover, without even certifying to the highest court of the District of Columbia several critical issues, such as whether District law creates private rights of action. Its rulings disregard settled local law and erroneously resolve unsettled local-law issues. In addition, the D.C. Circuit refused to eliminate from the decree measures that admittedly exceed local law. It did so

on the ground that, since the District conditionally agreed to a decree that purported to cure federal-law violations and reserved its right to challenge federal liability, and since, as it turned out, the decree exceeds federal law -- which was the District's point all along -- the District's conditional agreement was somehow transformed into an agreement to comply with a remedial decree that exceeds any and all legal requirements.

A federal court simply has no business attempting to reform local child-welfare institutions because it believes there may be a local-law basis for doing so. A federal court, in contrast to a local family-law court, has no expertise in child-custody matters; has no authority to terminate parental rights or to approve adoptions; and does not have before it the parents of children who have a constitutionally protected interest in their children. A federal court also has no business reforming local government institutions, over their objection or even with their consent, without determining that there is a legal basis for such reform. The rulings here therefore constitute a serious intrusion into family-law matters that are properly the province of local government institutions.[10/]

I. THE D.C. CIRCUIT'S DECISION THAT A FEDERAL COURT MAY REFORM LOCAL GOVERNMENT INSTITUTIONS WITHOUT A FEDERAL BASIS RAISES IMPORTANT QUESTIONS THAT SHOULD BE RESOLVED BY THIS COURT.

This Court has not expressly decided whether a federal court must have a federal basis for reforming local govern-

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[10/]The D.C. Circuit is not alone. See National Center for Youth Law, "Foster Care Reform Litigation Docket" (1993) (collecting numerous federal court child-neglect and foster-care cases in 16 states).

ment institutions and whether such judicial reform efforts must be limited to redressing federal rights. This Court's decisions, however, compel the conclusion that there are such limitations. Local government institutions, and the people they represent and serve, have a weighty and urgent interest in ensuring that their proper political powers are respected by federal courts. In addition, the Circuits have taken conflicting approaches in resolving these issues.

A. THIS COURT'S JURISPRUDENCE.

In *United Mine Workers of America v. Gibbs*, *supra*, this Court, in an action for damages involving only private litigants, ruled that a federal court may exercise pendent jurisdiction so long as a case contains a substantial federal question and the federal and nonfederal claims arise out of a common nucleus of operative fact. At the same time, however, it cautioned that:

> pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims . . .. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.

383 U.S. at 726.

In *Pennhurst*, this Court significantly limited *Gibbs*. It held that the 11th Amendment to the Constitution precludes federal courts from reforming state institutions based on state

law. As a consequence, a federal court may act only if it has a federal basis and it is limited to redressing federal rights. And, as this Court recently ruled in *Lewis v. Casey*, *supra*, even in the case of constitutional violations, a federal court has an obligation to ensure that any remedial decree is tailored to redressing those violations and that it respect the legitimate exercise of power by the political branches.

If the District of Columbia were a state, *Pennhurst* would plainly prohibit a federal court from exercising pendent jurisdiction in this case. For the reasons that follow, the fact that the District, like any other municipality, is not a state does not mean that a federal court has the power to reform its local government institutions beyond federal-law requirements.

This Court has made clear that even when federal judicial power is at its zenith -- where state and local governments have violated constitutional rights -- considerations of comity and federalism constrain a federal court's equitable power to reform state and local government institutions as a remedy. Furthermore, in such cases, this Court has not differentiated between a federal court's proper exercise of power over state governments and over local governments.

Thus, in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), the Court ruled that the principles of federalism and comity extend to government entities, there a county, which do not have the protection of the 11th Amendment. There, the Court admonished that "[f]ederal courts may not order States *or local governments*, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated." *Id.* at 389 (emphasis added). *See also Missouri v. Jenkins*, 495 U.S. 33, 50 (1990) (invalidating federal court's imposition of a tax increase against a local school district as a remedy for unconsti-

tutional school segregation because "the tax increase contravened the principles of comity that must govern the exercise of" a federal court's "equitable discretion"); *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) (Even in the case of federal constitutional violations, "the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."); *Milliken v. Bradley*, 418 U.S. 717, 741-45 (1974) (in remedying unconstitutional school segregation, a federal court must have a federal reason for disregarding the political authority and autonomy of local school districts and the citizens residing within them).

If, as this Court has ruled, there are constraints on a federal court's equitable power to reform local government institutions in order to redress *constitutional violations*, it follows *a fortiori* that there must be constraints on a federal court's equitable power to reform local government institutions to redress *violations of state or local law*. Indeed, given that the federal interest in the latter case is at its nadir, a federal court's authority should be sharply constrained. Except in the rarest of cases, a federal court should be required to find a federal basis for any such institutional reform and to limit its exercise of authority to the redress of federal claims. A federal court should not be permitted to exercise pendent jurisdiction to reform local government institutions based on state or local law.

A ruling that a federal court must limit itself to a federal basis in reforming local government institutions would advance important policies. It would help to ensure that federal courts do not improperly displace democratic processes and institutions. It would help to ensure fairness to litigants by reserving to state and local courts resolution of state- and local-law issues. And it would conserve scarce federal judi-

cial resources by prohibiting them from being diverted to cases that should be heard in nonfederal fora. In the context of this case -- difficult child-custody and related decisions traditionally within the purview of specialized family-law courts and involving litigants who are parties to proceedings in such courts -- these policies apply with especial force.

As this Court explained in *Ackenbrandt v. Richards*, 504 U.S. 689, 703 (1992), there are "sound policy" reasons for federal courts to refrain from deciding local-law issues in child-welfare cases -- reasons that are strong enough to support the judicially created domestic relations exception to the diversity jurisdiction of the federal courts. Among other matters, "[i]ssuance of decrees of this type not infrequently involves retention of jurisdiction by the court and deployment of social workers to monitor compliance." *Id.* at 703-04. Furthermore, "[a]s a matter of judicial economy, state courts are more eminently suited to work of this type than are federal courts, which lack the close association with state and local government organizations dedicated to handling issues that arise out of conflicts over . . . child custody decrees." *Id.* at 704. Finally, "as a matter of judicial expertise, it makes far more sense to retain the rule that federal courts lack power to issue these types of decrees because of the special proficiency developed by state tribunals over the past century and a half in handling issues that arise in the granting of such decrees." *Id.* at 704. *See also Moore v. Sims*, 442 U.S. 415 (1979) (to avoid displacement of state family-law courts, federal courts should abstain from deciding constitutional challenges to state child abuse-and-neglect systems when the federal plaintiffs have an opportunity to raise these challenges in state proceedings to which they also are parties).

The D.C. Circuit's ruling here violates the federalism and comity principles underlying this jurisprudence. Here, the

D.C. Circuit plunged itself into the thicket of District child-welfare policy and family law. These are quintessentially local matters, even more than public schools and nonfederal prison facilities, as this Court has recognized in implying an exception to a federal court's diversity jurisdiction in family-law matters and in ruling that federal courts must abstain from deciding constitutional issues arising from such matters when litigants may have these issues resolved in family-law courts. The D.C. Circuit has authorized federal regulation of the District's child-welfare system without any federal basis and it has done so even though Congress has committed to local government institutions local-law authority to act in this area.

Concomitantly, the D.C. Circuit, after refusing to decide whether there is a federal basis for the decree, then refused to measure the scope of the decree against local-law requirements even as it acknowledged that the decree exceeds local law, as well as federal law. As a consequence, Judge Hogan now sets child-welfare policy for the District, manages its child-welfare agency, and intrudes on the authority of the Family Division of the Superior Court. He sits as a combined local legislature, executive, and family-law court.

B. THE DECISIONS OF OTHER CIRCUITS.

The D.C. Circuit's decision in this case is sharply at odds with the approach taken by other federal appellate courts. These courts have declined to reform local government institutions without a federal basis and have recognized the primacy of family-law courts in family-law matters even in cases in which there is a federal interest.

The Seventh Circuit has held that a remedial order, which had been negotiated following a determination that a municipality was violating the Constitution, had to be dis-

solved when the federal predicate was overturned. In so holding, a plurality of the court, citing *Rufo*, explained that a federal court may not "require a unit of state or local government to abide by a consent decree that does not serve any federal interest," and that, without a federal basis, a federal court may not "intrude[] on the internal operations of [a] . . . City, telling the Mayor what items must be in the annual budget." *Evans v. City of Chicago*, 10 F.3d 474, 475 & 476 (*en banc*), *cert. denied*, 114 S. Ct. 1831 (1994). *Compare Komyatti v. Bayh*, 96 F.3d 955, 960 (7th Cir. 1996) (in litigation challenging constitutionality of state prison disciplinary proceedings, consent decree did not violate 11th Amendment by providing that permissible standards be set by reference to state law and contrasting that situation with one in which plaintiff "'relies on state law as the foundation for relief'").

The Eighth Circuit, in turn, has ruled that, in light of *Rufo* and *Suter*, Arkansas was entitled to request modification of a consent decree regulating its child-neglect and foster-care system. *Angela R. by Hesselbein v. Clinton*, 999 F.2d 320 (8th Cir. 1993). In so ruling, the court explained:

> Federal courts have interests independent of those of the states in preserving the appropriate relation between sovereigns and in efficiently allocating scarce federal resources to the adjudication of federal claims. . . . As *Pennhurst* makes clear, a federal court's interest in remedying violations of state law is decidedly minor, so that *expending significant federal judicial resources enforcing consent decree provisions that concern only issues of state law is rarely justifiable.*

> And consent decrees entered in institutional reform litigation "reach beyond the parties involved directly in the suit and impact on the public's right to sound and efficient operation of its institutions." . . . Therefore, the manner in which [state law] . . . is to be enforced by a court of equity "must be structured to take into account 'the well-established rule that the government has traditionally been granted the widest latitude in the dispatch of its own internal affairs.'"

999 F.2d at 325-26 (emphasis added). *See also Alexander v. Britt*, 89 F.3d 194, 200 (4th Cir. 1996) (observing, in a case in which state and local officials had violated federal statutory rights, that while "in a consent decree, defendants may agree, within limits, to do more than a judicially imposed injunction could have required . . ., [a] consent decree must, of course, still relate to an alleged violation of federal law . . .."); *Sweeton v. Brown*, 27 F.3d 1162, 1165 (6th Cir. 1994) (*en banc*) (consent decree against state prison officials should be dissolved when there was no longer a federal basis for decree even though state officials "may have been required to follow their own procedural statutes and regulations . . . as amplified in the consent decree as a matter of *state* law") (emphasis supplied by court), *cert. denied sub nom. Sweeton v. McGinnis*, 115 S. Ct. 1118 (1995); *Saahir v. Estelle*, 47 F.3d 758, 761 & 762 (5th Cir. 1995) (ruling that a federal court has no jurisdiction to enforce provision of consent decree "not . . . required by any federal or constitutional law" and explaining that "just as the scope of [a] consent decree does not enlarge the court's jurisdiction, the way the parties agreed to implement the remedy contained in the consent decree likewise cannot affect the jurisdictional bounds of the federal courts"); *Bergstrom v. Bergstrom*, 623 F.2d 517 (8th Cir. 1980) (dis-

missing claim that child had a constitutional right to remain in the United States following parents' divorce and mother's return to Norway as not ripe in view of child custody proceedings in state court); and *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978) (federal court should abstain from deciding whether grandmother had constitutional right to familial relationship with her grandchildren, who came to this country from Vietnam during "Operation Babylift," in deference to family-law court proceedings involving grandchildren).

The foregoing cases stand in sharp contrast to the decision here. They require federal courts to have a federal basis for restructuring local government institutions and limit federal courts to remedying the violation of federal rights. Furthermore, they show proper deference to the primacy of family-law courts in family-law matters even in cases in which there is a federal interest. Here, the D.C. Circuit *sua sponte* exercised pendent jurisdiction and it approved sweeping reform of a major District institution based on its preliminary and unauthoritative understanding of local law and without any consideration that Congress has reposed the authority to act in child abuse and neglect matters on local government institutions. It then refused to invalidate the decree insofar as it exceeded both local and federal law.

C. THE D.C. CIRCUIT'S JUSTIFICATIONS.

The D.C. Circuit stated that it would exercise pendent jurisdiction to avoid deciding complex constitutional and federal statutory issues. Neither justification withstands scrutiny.

First, the proposition that a federal court should decide pendent claims to avoid construing what it believes are complex federal statutes is a novel and startling principle. Fur-

thermore, as the initial decision of the *LaShawn II* panel majority made clear, the issues of federal statutory construction were no longer complex at the time of the *LaShawn I* decision, given this Court's decision in *Suter v. Artist M.*, 503 U.S. 347 (1992). In *Suter*, which was issued just after the District took its first appeal, this Court held that the federal Adoption Assistance Act "does not create an enforceable right on behalf" of children either under the statute itself or within the meaning of 42 U.S.C. § 1983. *Id.* at 350. Subsequently, the D.C. Circuit, citing *Suter*, has held that the other federal statute relied on by plaintiffs here is not enforceable pursuant to 42 U.S.C. § 1983. *See Doe by Fein v. District of Columbia*, 93 F.3d 861, 865-67 (D.C. Cir. 1996).

Second, insofar as plaintiffs' constitutional claims are concerned (*e.g.*, a right to services that would permit a child to remain in his or her home; a right to be adopted), the D.C. Circuit could have avoided deciding them, in the case of children who are parties to Family Division proceedings, by abstaining pursuant to *Moore v. Sims, supra.* A Family Division judge could not and would not conclude that a placement which violates a child's constitutional rights is in that child's best interests. In the alternative, the D.C. Circuit could have decided the constitutional claims, and had they been found wanting, as the District urged, it could have dismissed the case. This alternative is supported by the sound policy reasons set forth in *Pennhurst* that make it incumbent upon a federal court, in institutional reform litigation against a state, to decide constitutional claims rather than exercise pendent jurisdiction. See 465 U.S. at 121-22 & n.32.

II. THIS CASE ILLUSTRATES WHY THIS COURT SHOULD HOLD THAT A FEDERAL COURT MUST HAVE A FEDERAL BASIS FOR REFORMING LOCAL GOVERNMENT INSTITUTIONS AND MUST LIMIT ITSELF TO REDRESSING VIOLATIONS OF FEDERAL RIGHTS.

This case vividly illustrates why deference to the principles of federalism and comity is important to ensure that federal courts do not improperly displace legitimate democratic processes and local government institutions. The local-law route was, and continues to be, seriously flawed.

1. It violates the Court Reform Act in which Congress vested "exclusive jurisdiction" of neglect and adoption proceedings in the Family Division. See D.C. Code § 11-1101(9) & (13) (1989 repl.).

2. It misreads the Youth Residential Facilities Licensure Act of 1986. The mandamus provision (D.C. Code § 3-808(d)(1)) cited by the *LaShawn I* court (App. 95a) is qualified by § 3-808(d)(2): "Any person bringing an action under paragraph (1) of this subsection shall give the named defendant(s) at least 5 days advance notice . . . before the action is filed in court." Statutory notice, a condition precedent to bringing this action, was not given here. *See Campbell v. District of Columbia*, 568 A.2d 1076 (D.C. 1990).

3. It misreads *Turner v. District of Columbia,* 532 A.2d 662 (D.C. 1987). In *Turner*, the District's highest court merely held, in a ruling it characterized as "exceptional," that the District's Abuse and Neglect Act creates a special relationship between the District and a child reported to be abused and thus precludes the District from raising the public duty doctrine as a bar to a tort claim otherwise cognizable under

the common law. *Id.* at 675 n.11. A federal court acts improperly in construing such a decision as a mandate for judicial reform of local government institutions. *See Women Prisoners of the District of Columbia Dep't of Corrections v. District of Columbia*, 93 F.3d 910, 919-23 (D.C. Cir. 1996) (district court abused its discretion in exercising pendent jurisdiction in prison reform case and in inferring from local-law decisions allowing damages actions judicial power to issue injunctive relief reforming penal institutions), *petition for a writ of certiorari pending*, No. 96-1280 (filed Feb. 12, 1997).

4. It is based on a false premise that an unpublished internal agency operating manual constitutes District law. *Compare* App. 92a *with* D.C. Code § 1-1538(b) (1992 repl.).

Furthermore, events subsequent to *LaShawn I* have exacerbated matters. The remedial decree was re-entered virtually without alteration even though many of its provisions cannot possibly be "based on" District law as *LaShawn I* directed. Indeed, Judge Hogan expressly invoked his "equitable powers" to impose on the District requirements that admittedly exceed local law. In so doing, Judge Hogan displaced the Mayor's lawful local-law authority to establish child-welfare policy and to allocate scarce resources, subject to the oversight of Congress, the Council of the District of Columbia, and the Family Division of the Superior Court; and he also intruded into the functions of the Family Division. See App. 195a (remedial decree authorizes expert to decide services and plans for named plaintiffs); App. 198a (remedial decree establishes 42-day maximum limit for children in voluntary care in contrast to 90-day renewable limit permitted by District law, D.C. Code § 6-2124(c)(1)); App. 200a (Mayor to arrange with Family Division for implementation of a process to ensure that Family Division conducts hearings required by decree).

More recently, Judge Hogan has appointed a general receiver to implement the decree and thus has further encroached on the legitimate powers of the Mayor. See Docket Entries Nos. 366 & 367 (D.D.C. May 22, 1995). In addition, he has authorized the receiver to ignore District procurement and other laws, and he has set aside lawful Council legislation.[11/] In short, the decree, which is now supposed to be "based on" District law, has resulted in federal judicial intrusion into every branch of the District government.

CONCLUSION

The District is acutely aware that its child-neglect and foster-care system must be improved to ensure the well-being of its most vulnerable children. However, a federal court may not assume the roles of local legislature, executive, and judiciary in the apparent belief that it can do a better job than the combined forces of the District of Columbia government in establishing wise policies for the care of abused and neglected children, in allocating scarce resources, and in interpreting and enforcing local law. Before a federal court embarks on a journey into one of the central functions of a local government, it ought to have a federal reason for doing so; its journey should be limited to its federal concerns; and it should not intrude into areas in which local courts are exercising their authority. Nor can a federal court impose on a local government a remedial decree in which an essential condition of the decree -- federal liability -- has not been found. That decree is null and void unless the court finds a proper basis of liability and tailors the decree accordingly.

[11/] Judge Hogan refused to give effect to emergency financial measures enacted by the Council, which mandated salary reductions for most District employees, as well as periodic reductions-in-force (*e.g.*, one day each month), insofar as the measures apply to DHS child-welfare employees.

This Court should therefore review the decision of the D.C. Circuit. This Court should rule that any federal-court decree reforming and regulating local government institutions, especially those administering child-neglect and foster-care systems, must have a federal basis and be limited in scope to curing violations of federal rights.[12/]

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[12/]There is one other consideration. One result of the D.C. Circuit's decision may be to require the financially pressed District to pay attorney's fees to plaintiffs' counsel for this entire litigation even though plaintiffs have prevailed (mistakenly) only on local-law grounds. This potential fee award, and future potential fee awards for monitoring the remedial decree, are also compelling reasons for this Court to review the decision below.